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Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 745.

ABRAHAM MOSKOW ET AL.,
Petitioners,

v.

BOSTON REDEVELOPMENT AUTHORITY ET AL.,
Respondents.

BRIEF ON BEHALF OF RESPONDENTS NEW ENGLAND MERCHANTS NATIONAL BANK OF BOSTON AND ANDREW A. HUNTER IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

RICHARD WAIT,
JASON A. AISNER,
Solicitors for the Respondents New England Merchants National Bank of Boston and Andrew A. Hunter.

ALDEN C. MITCHELL & SON, INC., LAW PRINTERS, BOSTON.

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The New England Merchants National Bank of Boston and Andrew A. Hunter, two of the respondents in the above-entitled case, join in this brief in opposition to the petition for certiorari. Their position is different from that of the other respondents. Each demurred to the petitioners' bill of complaint. The primary reliance of each was that no declaration was asked against either.* Their demurrers were sustained in the Superior Court and on appeal the Supreme Judicial Court affirmed the interlocutory decrees sustaining them. That court said in its opinion:

> "The only prayer of the bill pertinent to declaratory relief is the fourth prayer for a decree that 'the taking

*The statement on page 5 of the Petition that the respondent Hunter was a director of the bank is not so. He is not and never has been a director of that bank.

> of the plaintiffs' property by the Authority . . . was illegal and a nullity.' This prayer does not directly affect the bank or Hunter. Their demurrers were rightly sustained, because as to them the bill fails to state a controversy under the declaratory procedure." (Petition, p. 29.)

The petitioners do not attack this position in their present petition. The question they ask the court to answer is:

> "May the Supreme Judicial Court, after reversing the Superior Court and overruling the demurrers, simultaneously and without further notice or hearing enter a judgment declaring the taking valid, without violating the due process clause of the Fourteenth Amendment to the United States Constitution?" (Petition, p. 3.)

The Supreme Judicial Court did not overrule our demurrers. It affirmed the action of the Superior Court in our favour. Consequently by its language the petitioners' "Question Presented" does not touch us and it might be appropriate for us to stop with that statement. But we are named as respondents and, if the petition should be granted, we would still be involved in the litigation, which we do not desire, so we state, as concisely as may be, why the petition should be denied in toto.

The point which has been presented is not a constitutional one at all. It is simply a question of practice in the Massachusetts courts on proceedings for declaratory relief. If instead of ordering the entry of a negative declaration the court had simply affirmed the final decree, no such point could have been made. But the result would have been precisely the same. A decree dismissing a bill of complaint establishes finally that no relief can be granted to the plain-

tiff on the facts set forth in the bill. In the face of such a decree no possible avenue would have remained open on which the plaintiffs could have attacked the title which the Authority obtained when it took the plaintiffs' land. All that the plaintiffs sought was to impeach the taking. A simple decree dismissing the bill following appearance by the Authority would have established that the taking was not impeachable quite as fully as the declaration actually entered that it "was not illegal and was not a nullity."

Counsel for the petitioners are not exact when they say:

> "The true meaning of the rule is that a demurrer raises only the question *whether any,* not the question *what,* declaration should be entered. The question *'what'* is *immaterial* on demurrer; it is left for later disposition, both as to questions of law and questions of fact, if the demurrer be overruled. And if the demurrer be sustained there is clearly, under Massachusetts practice, no judgment on the merits." (Petition, p. 10.)

Under Massachusetts practice a final decree following an interlocutory decree sustaining a demurrer is just as much a final decision on the record as one entered following a trial on the merits.

Keown v. *Keown,* 231 Mass. 404, 408.

The Massachusetts court made it quite clear that the point is one of practice, not of substance. The Chief Justice said:

> ". . . it would have been better *practice* to overrule the demurrers and enter a negative declaration." (Petition, p. 29; emphasis supplied.)

Patently, this Court is not going to concern itself with the niceties of Massachusetts practice.

Due process could enter the picture only if the practice were such as to deny the petitioners the right to put forward their case. The decision was made wholly on the basis of their own statement of that case. Every fact pleaded by the petitioners was fully admitted by the demurrers. If there had been a trial, the proof could not have outrun the allegations. The petitioners put their best foot forward and were satisfied they had done so. The Superior Court in sustaining the demurrers did not deny the plaintiffs' leave to amend, and under the rule amendments might have been offered if any facts had been left out.* But none was offered. The "facts" were established quite as fully as if there had been a trial. That being so, there was no obstacle to a declaration.

Berman v. *Parker,* 348 U.S. 26.

We are quite unable to understand how the petitioners can say, as they do in discussing *Willcutt* v. *Prescott,* 340 Mass. 532, and *Trustees of Reservations* v. *Stockbridge,* 1965 Adv. Sh. 265 (at pp. 10 and 11 of the Petition): "The Court in each case categorically stated, *what it could not* and did not *state in the opinion in this case,* that 'There are no facts in dispute . . .'" (Emphasis supplied.)

Granted that the court did not state that, it could have done so had it wanted to state the obvious. The case was heard on demurrer and on such a hearing no fact can be in dispute.

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*Superior Court Rule 23: ". . . If a demurrer is sustained, and leave to amend is not denied, a case shall be deemed ripe for final judgment or decree only after ten days from the sustaining of the demurrer, or such other time as the court may allow for amendment, and then only after the disposition of any motion to amend the pleading demurred to, filed within such time. After the expiration of such time no motion to amend such pleading shall be filed without leave of court."

On the question of the propriety of making a binding declaration on demurrer a clear distinction exists between a declaration adverse to the plaintiff and one in his favour. If it appears on the allegations made by the plaintiff himself that he is not entitled to the affirmative declaration which he asks, there is no reason against making a negative one. The allegations are his own. On the other hand, they may not be susceptible of proof, however honestly made, and the law gives every defendant the privilege to demur without foreclosing further defense, so, as pointed out in *School Committee of New Bedford* v. *Commissioner of Education*, Mass. Adv. Sh. (1965) 1029, it is not appropriate to make a declaration in favour of the plaintiff at that stage. The *New Bedford* case consequently does not exactly resemble the case at bar as the petitioners assert at page 9 of the Petition. If the plaintiffs' allegations fail to show a cause of action, he cannot prove a case. If they do show a cause of action, he still may not prove a case.

Insofar as the petitioners' complaint is that they were not heard on what the declaration should be, there is nothing in it. The declaration made related solely to the validity of the taking—which was all that the petitioners had asked to be declared. The entire argument on the appeal (save for the question of whether the bank and Hunter were properly concerned) was addressed by both sides to the validity of the taking. No word which counsel desired to utter or to print was shut off. The form of the declaration changed the petitioners' own language from affirmative to negative and did no more. As far as wording went, once the court had determined that the allegations were insufficient to impeach the taking, there was nothing to argue about. Moreover, there was a further hearing in the Superior Court before the entry of the final decree after rescript at which any question of wording could have been raised.

The Petition does not endeavour to reach the merits and asserts no error, constitutional or otherwise, in the substantive decision by the Supreme Judicial Court that the circumstances leading to and causing the taking of the petitioners' property did not vitiate the taking. No respondent, consequently, is called upon to discuss the merits. The point presented is one of practice and nothing more. We submit that the answer to the "Question Presented" set forth on page 3 of the Petition is "Yes," and urge the court to deny the Petition for Certiorari.

Respectfully submitted,

RICHARD WAIT,

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